ordination of a fellow employe, or his death, or illness, may constitute an "emergency" within the meaning of § 2, however, justifying the retention of an operator overtime; and this regardless of the lack of justification for such insubordination. *U. S.* v. *Denver & R. G. Co.*, 220 Fed. 293, 136 C. C. A. 275; *U. S.* v. *Southern Pacific Co.*, 209 Fed. 562, 126 C. C. A. 384. In case of accident, the company is not deprived of the benefit of the proviso unless the accident was one which could have been foreseen and prevented by the exercise of the high degree of diligence demanded. Examples of such causes, deemed not sufficient to excuse the defendant, are: side-tracking for late train; running out of steam; hot box; unusually heavy movement of grain; high wind or storm causing delay, but not obstructions or breaks in the track. *U. S.* v. *Kansas City Southern Ry. Co.*, 202 Fed. 828, 121 C. C. A. 136; *Great Northern Ry.* v. *U. S.*, 218 Fed. 302, 134 C. C. A. 98. In case of wreck, if the crew is kept on duty wholly because of the derailment, the defendant is excused for the overtime service, but if they could have been relieved after the wreck by the exercise of due diligence, and were not, the benefit of the proviso is withdrawn from the company. *San Pedro L. A. & S. L. Ry. Co.* v. *U. S.*, 220 Fed. 737, 136 C. C. A. 43. In another instance, the dispatcher knew of a wreck on the line, but relied on a message from the wrecked train that the track would be cleared in thirty minutes, and sent out a waiting train. Due to delay in clearing the track, the crew of the latter train was kept on duty more than sixteen hours, and it was held that the over-time service was caused, not by the derailment, but by the order of the dispatcher, and that the latter should have waited for more trustworthy information, remarking that the "duty of the carrier to comply with the statute must be placed above its zeal to hasten transportation." H. R. H.

ADMISSIBILITY OF ARTICLES TAKEN FROM THE ACCUSED OR HIS PREMISES WITHOUT A SEARCH WARRANT.—In *Flagg* v. *United States*, 233 Fed. 481, an indictment for fraudulent use of the United States mails, the Circuit Court of Appeals for the Second Circuit held that incriminatory articles, papers, etc., taken from the defendant's place of business by municipal policemen, without a search-warrant, could not be used as evidence against him, because such action was violative of the Fourth and Fifth Amendments of the Federal Constitution.

The Fourth Amendment provides that "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or things to be seized." The Fifth Amendment provides inter alia, that no person "shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law."

The defendant was arrested by the municipal patrolmen without a warrant and taken to the post office building where he was arrested under a warrant charging a violation of a criminal code protecting the use of the mails. At

the same time the patrolmen arrested the accused without a search warrant they took his papers and books from his office to the post office. But no search warrant was even then sworn out against them. At the trial these papers were used as evidence and because of such use the Circuit Court of Appeals reversed the decision.

The weight of authority is overwhelming against the instant case. With a few recent exceptions every state has an unbroken chain of decisions admitting evidence illegally obtained. *Shields* v. *State,* 104 Ala. 35; *Gindrat* v. *People,* 138 Ill. 103, 27 N. E. 1085; *Seibert* v. *People,* 143 Ill. 571, 32 N. E. 431; *State* v. *Burroughs,* 72 Me. 479; *Commonwealth* v. *Tibbetts,* 157 Mass. 519, 32 N. E. 910; *State* v. *Kaub,* 15 Mo. App. 433. The English doctrine is with these cases. *R.* v. *Granatelli,* 7 State Trials N. S. 979; *Phelps* v. *Prew,* 3 E. & B. 430, 441.

Mr. WIGMORE (§ 2264) holds that illegal seizure does not violate the Fourth Amendment because historically considered our constitution makers incorporated it to secure the people against searches and seizures authorized by "general warrants" for the discovery of persons suspected of treasonable designs or political intrigues; such warrants—so frequently issued in England just prior to our Revolution—were finally abolished by the heroic fight of Wilkes and the wisdom of Lord Camden, *Entick* v. *Carrington,* 19 How. St. Tr. 1029. He contends that this provision was never intended to protect a party arrested upon reasonable suspicion of guilt, but that it was intended to protect the public from "general warrants" only.

He further contends that books, papers and evidentiary articles illegally seized are competent as evidence and their admission does not violate the Fifth Amendment, because a man being compelled to testify against himself is one thing, and his property and papers testifying against him is an entirely different thing. His property is a mute but effective witness as much as any other competent witness whose testimony may have been secured by illegal means. The accused and his property are two distinct witnesses.

Continuing (§ 2264) Mr. WIGMORE argues that the admission of evidence illegally obtained would never "have suffered any judicial doubt but for a modern opinion in which * * * the seeds of a dangerous heresy were sown." *Boyd* v. *United States,* 116 U. S. 616. The case decides that it does not require actual entry of premises and search for and seizure of papers to constitute an "unreasonable search and seizure" within the meaning of the Fourth Amendment, that a compulsory production by the defendant of private papers is a violation of said amendment and evidence obtained therefrom is inadmissible if obtained without a search warrant. The decision of this case goes further in protecting the accused than the facts of the instant case call for.

In *Weeks* v. *United States,* 232 U. S. 383, the facts are approximately the same as in the instant case, holding that where no search warrant has been duly issued in accordance with the Fourth Amendment all evidence obtained by such illegal search is inadmissible.

COOLEY, CONSTITUTIONAL LIMITATIONS, (6 ed.) 370, goes so far as to say that a search warrant should not even be allowed for the purpose of obtaining evidence, except in a few special cases where the subject of the crime is

concealed, and the public or complainant has an interest in its return or destruction. The power to search private books and papers should be authorized in extreme cases only. He says "the maxim that 'every man's house is his castle' is made a part of constitutional law in the clauses prohibiting searches and seizures and has always been looked upon as of high value to the citizen." LIEBER, CIVIL LIBERTY AND SELF GOVERNMENT, 62, says "No man's house can be forcibly entered or he or his goods be carried away except in cases of felony, and then the sheriff must be furnished with a warrant."

Mr. Justice BRADLEY—speaking in the *Boyd* case—is quoted in the *Weeks* case, and the instant case as follows: "The principles laid down in this opinion affect the very essence of constitutional liberty and security * * * they apply to all invasions on the part of the government and its employes of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offence—it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment."

According to these cases the effect of the Fourth Amendment is to put the courts and officers under limitations which are provided in the Fourth Amendment, that without a search warrant a man's private matters may not be searched, and that they may be searched under a search warrant only when the requirements of the Constitution are all present, to-wit: a reasonable search, upon probable cause, supported by oath, with a particular description of the place or person to be searched.

But granting that an illegal search and seizure is itself unlawful, the question still remains, does this illegal taking so vitiate and disqualify the evidence of crime thus obtained as to make it inadmissible as evidence? If so, upon what theory? The instant case holds that the Fourth and Fifth Amendments are so closely related in spirit and purpose that evidence obtained by a violation of the Fourth Amendment and offered on trial, constitutes a violation of the Fifth Amendment, because in effect it compels a man to incriminate himself, and hence is inadmissible.

The courts holding the contrary doctrine hold there is not so close a relation between the two amendments that the evidence by its illegal procurement becomes violative of the Fifth Amendment.

The court in *Weeks* v. *United States,* 232 U. S. 383, 395, in quoting from *People* v. *Adams,* 176 N. Y. 351, says, "the underlying principle obviously is that the court, when engaged in trying a criminal cause, will not take notice of the manner in which witnesses have possessed themselves of papers, or other articles of personal property, which are material and properly offered in evidence." Many cases sustaining the above quoted theory may be found in a note to *State* v. *Turner,* 82 Kan. 787, in 136 Am. St. Rep. 129 at page 135.

It is left for future decisions to indicate what influence *Weeks* v. *United States* and the instant case, in following *Boyd* v. *United States,* will have upon the old rule admitting illegally-obtained evidence to assist in convicting for crime.

G. C. C.